No.89-31

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FRIENDS OF WARWICK POND AND HOXSIE
also WARWICK LAND TRUST, PAUL HULING,
JEANNE M. FOSTER, EILEEN NAUGHTON and
KATHLEEN PREISS

Petitioners

vs

CHILDREN'S FRIEND AND SERVICE, INC.,
FRANK P. SHERRY, R & F ASSOCIATES,
RHODE ISLAND CENTRAL CREDIT UNION and
JOHN DOES, ONE through FIVE

Respondents

and JAMES O'NEIL, in his capacity as
Rhode Island Attorney General

Additional Party — Respondent

Petitioners' Reply Brief In Support Of A Writ Of Certiorari To The Supreme Court Of The State of Rhode Island

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QUESTIONS PRESENTED

1. Whether it was plainly untenable and a denial of due process for the R.I. Supreme Court to carve out a new rule denying petitioners standing and apply it retroactively against diligent representative plaintiffs disregarding (a) their demonstrated compliance with the R.I. adopted Federal standing/access barrier test and (b) four prior R.I. Supreme Court decisions and a R.I. statute that the Attorney General, whom the plaintiffs had named at the outset, is but a necessary party to charitable trust litigation.

2. Whether it was plainly untenable, a denial of due process and a violation of Rule 56 of the Rhode Island (Federal) Rules of Civil Procedure to approve the granting of summary judgment on a record which shows (a) that the trial/lower court below's sole ultimate finding was based on a mistaken conception of its decisional authority and (b) that important discovery - addressed to the movants themselves - was still outstanding and (c) that, at most, the defendants had raised merely a mixed question of law and fact.

3. Whether it was plainly untenable and a denial of due process for the R.I. Supreme Court to give weight to a purported R.I. Attorney General opinion (or finding) of "no fault" in the defendants' sale/purchase of the charitable property at issue ("Lakeside") for commercial real estate development which "opinion" (a) was not part of the record, (b) the plaintiffs had never seen, much less been given an opportunity to answer, and (c) whose existence was not asserted until the February 13, 1989 appellate oral argument.

4. Whether the United States Supreme Court will summarily reverse and remand for further proceedings a case which turns on state adopted Federal law (standing, *res judicata* and Rule 56 summary judgment) all patently violated by the courts below, thus depriving representative plaintiffs of their sole means of preventing monetary, recreational and environmental damage to themselves, their homes and their community.

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Petitioners' Reply Brief In Support Of Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Rhode Island

Petitioners reply to the respondents R&F Associates and Rhode Island Central Credit Union's brief in opposition received by mail on July 31, 1989*. No other respondents' briefs have been received.

Respondents' Overall Strategy

Even after a thirty day, July 3, 1989 extension to complete their research of the "several issues" raised by the petitioners and permit the preparation of a "coordinate[d]" response "in consideration with the other Respondents" (Extension Petition pars. 2 and 4) R&F (and

*Although dated "July 10, 1989" said respondents' brief was timely served within a thirty day time extension granted by order dated July 3, 1989.

its banker) offers nothing more than irrelevant technicality, murky obfuscation and bizarre vituperation*. Only R&F has filed a response to the plaintiffs' June 10, 1989 petition. Children's Friend and Service ("CF&S") and the Rhode Island Attorney General remain silent. The apparent tactic is to let R&F file the response but say nothing about (1) CF&S' damning, still unexplained, trust title admissions and its incomplete, censored, contemporaneous corporate minutes and (2) the R.I. Attorney General's late surfacing, still missing, "opinion(s)". (See petition for certiorari, 3n, 6-7, 13, 20-25).

THE QUESTIONS PRESENTED ARE PROPERLY BEFORE THE COURT

It is disingenuous for respondents to say that the petitioners should be denied relief for alleged failure to raise federal questions. This case turns on state adopted Federal rules and case law — *res judicata; res judicata* and subject matter/fundamental jurisdiction; standing; Federal Rule 56 and summary judgment decisions. (Plaintiffs' petition, 9n) Indeed, it was the respondents themselves, through their R.I. (Federal) Rule 56 summary judgment motion(s) who raised them. All were briefed and re-briefed below, respondents contrary assertions notwithstanding. (See plaintiffs' petition 2, 6, 7-9, 9n, 11-14, 18, 19-22, 25 and 28)

Going beyond those federal questions (petition 25-27), the Court should also summarily remand, for completion of petitioners' interrupted discovery, because of the plain error below in breach of federal constitutional standards. (Petition 27-28) These breaches were three in number (1) standing (Petition 16-17, 25); (2) the Attorney General's non-record "opinion" (Petition 9-10, 22-25); and (3) the lower courts' handling of Rule 56 summary judgment (Petition 18-22, 28). Thus, *Webb v Webb*, 451 U.S. 493 (1981), respondents' brief pp. 7-8, can give them no help in this case. As Justice Powell, joined by Justice Brennan, noted in his concurring opinion (*Webb, supra* at 502):

> "I join the Court's opinion with the understanding, however, that the broad statements in it are not to be taken as departing from the rule, reaffirmed just this Term, that the Court has jurisdiction to review plain error unchallenged in the state court when necessary to prevent fundamental unfairness. *Wood v. Georgia*, 450 US 261, 265, n 5, 67 L Ed 2d 220, 101 S Ct 1097 (1981). See also *Vachon v. New Hampshire*, 414 US 478, 38 L

*See page 6, *infra*.

Ed 2d 665, 94 S Ct 664 (1974) (finding plain error in an appeal from a state court)."

DENYING PETITIONERS' STANDING WAS PATENTLY UNTENABLE

While devoting considerable space to Rhode Island adopted federal injury-in-fact standing law (Respondents' brief 9-14; plaintiffs' petition 6, 9n, 12, 13-17) the respondents make no mention of the petitioners' uncontradicted claims and proof of such injury. (Petition 4, 7, 9, 11-12, 13-14, 16; Petitioners' Appendix 23-29)

Similarly, while arguing the proposition that only the Attorney General may sue to enforce a charitable trust (Brief 9, 11-12), the respondents make no mention of the four prior R.I. Supreme Court decisions, spanning 50 years (1926-1977) and a 1956 R.I. Statute — all demonstrating that the Attorney General is *not* the sole person who may sue and that notice and participation opportunity, which the petitioners have duly given, is sufficient. (Petition 14-16; P.A. 6).*

Respondents purport to have given more attention to the standing issue than they really did. For example, a good number of the decisions noted under standing at pages 13-14, actually pertain, not to standing, but to other issues herein, i.e. summary judgment**, *res judicata* and other subject matter/fundamental jurisdiction***, and basic due process.****

RULE 56 SUMMARY JUDGMENT WAS PATENTLY UNTENABLE

Respondents' treatment of this issue (plaintiffs petition 17-22) is also largely obfuscation. The Court will find no mention of Lakeside's 1912-16 acquisition with funds specially solicited from community members in aid of pre-existing charitable programs (petition 4, 7, 9, 19, 23); the initial charitable holder's repeated recognition of its resultant charitable trust duties (petition 4, 7, 9, 19, 23-24); the fact that the R.I. Supreme Court's 1951 *cy pres* decree represents a deter-

*A 1905 decision, *Stearns v The Newport Hospital*, 27 R.I. 309 62 A 132 (Respondents' brief 17) has no application. (Petition 15n). *McCarthy v McAloon*, 79 R.I. 55, 83 A.2d 75 (1951) has no application when injury is demonstrated. *See, Roch v Garrahy*, 419 A.2d 827 (R.I. 1980) at 829-31.

**Adickes v S.H. Kress & Co.*, 398 U.S. 144 (1970); petition 19, 22;

***Bradley v Fisher*, 80 U.S. 335 (1872); *Stump v Sparkman*, 435 U.S. 349 (1978); petition 18.

****Goldberg v Kelly* 397 U.S. 254 (1970); *Greene v McElroy*, 360 U.S. 474 (1959); petition 23, 28

mination that Lakeside was held upon charitable trust (petition 4-5, 17-18; respondents' brief 15); CF&S' repeated admissions of trust title in its initial August 1987 memorandum or its clumsy, transparent 1988 efforts to withdraw them (petition 6-7, 20-21; P.A. 30-31 and 42-44); and respondents' resistance to petitioners' outstanding discovery, including a pending motion to compel production of complete unexpurgated copies of CF&S' contemporaneous 1950-51 director's minutes* (petition 6-7, 18-22).

Without mentioning *Hartt v Hartt*, 397 A.2d 518 (R.I. 1979) and *State v Souza*, 456 A.2d 775 (R.I. 1983) adopting the federal *res judicata*, subject matter/fundamental jurisdiction law of *Bradley v Fisher* and *Stump v Sparkman, supra*** (Petition 18), respondents try to by-pass this sticky wicket by pointing to *Taviera v Solomon*, 528 A.2d 1105 (R.I. 1987) and the law of the case doctrine (Brief 15-16). However, as *Taviera* states at 1107, the law of the case doctrine applies not to 37 year old final judgments but, rather, to interlocutory decisions in a pending suit, citing *Salvadore v Major Electric & Supply, Inc.* 469 A.2d, 353, 356 (R.I. 1983). As *Salvadore* makes clear, the law of the case doctrine is not to be confused with the "finality of the doctrine of *res judicata*." It is *res judicata* and its application to fundamental/subject matter jurisdiction judgments, which makes a 1988 summary judgment overuling a 1951 *cy pres* decree so wrong. (Petition 17-18).

Similarly, the respondents argue that summary judgment was proper by claiming that Justice Bourcier made a finding that the 1951 *cy pres* conveyance was in "fee simple, without any charitable restrictions whatever", citing in support the bare deeds and *South Kingstown v Wakefield Trust Co.*, 48 R.I. 27, 134 A.815 (1926). (Respondents' brief 14-17; plaintiffs' petition 20-22, 23-25). Judge Bourcier made no such finding (petition 8n, 17n and 20). However, even assuming a distinct finding that the 1951 conveyance to CF&S was in "fee simple, without any charitable restrictions," the record shows, at best, nothing more than a mixed question of law and fact and thus, improper for summary judgment determination:

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*And which may be expected to cast light on CF&S' title expectations and admissions.

**And, having merely noted these United States Supreme Court decisions under the standing issue, for which they had not been cited! See page 3, *supra*.

1. Even with important discovery demands outstanding, the record contains substantial evidence that Lakeside was charitable trust property (Petition 19-20, 23-24).

2. Judge Walsh's 1951 acceptance and exercise of *cy pres* authority over Lakeside as trust property was most appropriate (Petition 4-5, 19, 23-24).

3. The Superior Court's 1951 *cy pres* decree was an essential link in CF&S' chain of title as the subsequent April 1951 deed declares (Petition 4-5, 19; P.A. 11-12, 13-14; R.A. 12; *see* also, 46 *Am Jur 2d, Judgments*, Sec. 541).

4. CF&S has admitted the *cy pres* source and the trust nature of its title (Petition 6-7, 20-22; P.A. 30-31 and 42-44).

5. *Wakefield, supra*, holds that the Superior Court has exclusive, mandatory, continuing jurisdiction over the transfer of charitable trust property even where (a) there had been *no* prior judicial proceedings regarding the charitable trust property and (b) the circumstances did *not* call for the application of *cy pres*. See excerpt from opinion appended hereto (Petitioners' Supplemental Appendix 1); see also Petition 25n).

6. No case has been found — before this one — and none has been cited by the respondents or the courts below, where once *cy pres* has been invoked, a sucessor charity's attempt to dispose of the property, unilaterally and without court authority, has been upheld. (Petition 22)

7. CF&S has produced no letter, memorandum or other contemporaneous (1950-51) document which shows an intention to convey "fee simple title, without any charitable restriction" and, as indicated above, has withheld the very contemporaneous records which would shed light on its title expectations (Petition 19-21 and authority cited therein.)

RELIANCE ON AN UNPUBLISHED, NON-RECORD ATTORNEY GENERAL'S OPINION WAS PATENTLY UNTENABLE

While respondents claim the benefit of the Attorney General's purported finding of "no fault" in CF&S' unilateral 1987 "sale" of Lakeside for private commercial development (Brief 9, 16-17), they make no mention of (a) the late surfacing, still missing, R.I. Attorney General's "opinion" upon which the aforementioned finding was purportedly based or (b) the resulting breach of basic constitutional due

process. (Petition 22-25, 27-28). The Attorney General's deafening silence — here and below — has already been noted. (Petition 3n, 22).

RESPONDENTS' BIZARRE, UNFOUNDED CHARGES

There is no substance to respondents' assertion (17-18) that the petitioners (a) requested the Clerk not to docket their petition or (b) are in violation of Rules 21 and 29. The petition was timely served and filed by mail, without condition or reservation, on June 10, 1989. No application for any extension was made by the petitioners at any time.*

As filed correspondence confirms, the Clerk informed petitioners' counsel that Rule 21.1 (a) requires that the questions presented for review must appear immediately inside the cover. Counsel promptly expressed written apology for his error and, with the knowledge and apparent consent of one an all, promply complied by having all copies rebound and a duplicate statement of the questions inserted. Pursuant to Rule 33.7 the breach was considered cured and the filing timely.

Respondents' other charges (17-18) are equally lacking in merit and require no comment. Petitioners are content that the petition for certiorari and this reply brief be judged on their merits.

CONCLUSION

As provided in 28 U.S.C. Sec. 2106, this case should be summarily remanded for completion of the petitioners' pre-trial discovery.

Providence, Rhode Island
August 11, 1989

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*As a clerk confirmed to petitioners' counsel of record, some two weeks before the deadline, Rule 20.6 declares that such applications "are not favored" and are not lightly granted.

PETITIONERS' SUPPLEMENTAL APPENDIX

Excerpt from Plaintiffs' Petition for Reargument below, February 28, 1989 quoting *South Kingstown v Wakefield Trust Co.*, 48 R.I. 27, 32. 134 A. 815 (1926):

> "In view of our answer to the first question we will say in answer to the third that the Town of South Kingstown has *not a marketable* title to the property described in the bill. It may, however, sell the property if so *empowered* by the *Superior Court* in an *appropriate proceeding.* The complainant is required to administer the charitable trust created by the gift under the supervision of the court in equity. The purpose of the donor has not failed. The object of the charitable use is still existent. By reason of the growth of the village of Wakefield, the situation of the trust property upon the principal business street of the village, and the dangerous condition of vehicular traffic upon that street, the tract may no longer furnish a suitable location for a public school. The circumstances of the case do not call for the application of the *cy pres* doctrine, but merely for the exercise of the ordinary jurisdiction of the Superior Court, sitting in equity, over the *administration of trusts.* It is as if the State in the exercise of the power of eminent domain had taken the property in question for some public purpose. The purpose of the charitable trust would not thereby fail but the compensation received for the land taken could still be administered under the supervision of the court to carry out the charitable intention of the donor. If, as the complainant claims, the tract of land can no longer be advantageously used to carry out the charitable purpose of the donor it would be *within the jurisdiction of the Superior Court,* if satisfied of the force of the complainant's contention, to permit a sale of the property, without any condition or restriction which would hamper its sale at an adequate price, and then to direct the trustee as to the administration of the capital of the trust in its changed form to effectuate the charitable purpose of the donor set out in his deed to School District No. 6."
>
> (Emphasis added)